

## **PANEL DECISION**

### **FORTENOVA GRUPA v. Ivica Todoric**

### **Case No. DEU2023-0009**

#### **1. The Parties**

The Complainant is FORTENOVA GRUPA d.d., Croatia, represented by Odvjetničko društvo Hadžija i suradnici d.o.o., Croatia.

The Respondent is Ivica Todoric, Croatia.

#### **2. The Domain Name, Registry and Registrar**

The Registry of the disputed domain name <agrokor.eu> is the European Registry for Internet Domains (“EURid” or the “Registry”). The Registrar of the disputed domain name is eNom, Inc.

#### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on March 9, 2023. On March 9, 2023, the Center transmitted by email to the Registry a request for registrar verification in connection with the disputed domain name. On March 13, 2023, the Registry transmitted by email to the Center its verification response confirming that the Respondent is listed as the registrant and providing the contact details.

The Center verified that the Complaint satisfied the formal requirements of the .eu Alternative Dispute Resolution Rules (the “ADR Rules”) and the World Intellectual Property Organization Supplemental Rules for .eu Alternative Dispute Resolution Rules (the “Supplemental Rules”).

In accordance with the ADR Rules, Paragraph B(2), the Center formally notified the Respondent of the Complaint, and the proceedings commenced on March 21, 2023. In accordance with the ADR Rules, Paragraph B(3), the due date for Response was April 10, 2023. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on April 12, 2023.

The Center appointed Zoltán Takács as the sole panelist in this matter on April 27, 2023. The Panel finds that it was properly constituted. The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the ADR Rules, Paragraph B(5).

As per Paragraph A(3)(a) of the ADR Rules the language of the proceeding is English, that being the language of the Registration Agreement.

#### **4. Factual Background**

With more than 45,000 employees, 29 production plants and more than 2,500 sales locations and distribution centers the Complainant is one of the largest private employers in the South East Europe (SEE) region.

Key sectors of the Complainant's operations are the retail-, beverage production-, edible oil, fresh and processed meat, milk and dairy production sectors as well as the agricultural production.

The Complainant was formed in 2019, after implementation of the creditors' settlement in the Croatian company called Agrokor d.d. and consolidation of Agrokor d.d.'s financial and ownership structure in the Complainant.

The Complainant is owner of a number of national and regional trademark registrations comprising the word Agrokor, including the European Union Trademark Registration ("EUTM") No. 011954872 for the word mark AGROKOR registered since March 8, 2014, for goods and services of classes 31, 35, 36, and 37 of the Nice Agreement Concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks.

The Respondent is a former majority owner of the Complainant's predecessor in title Agrokor d.d., and has registered the disputed domain name on June 30, 2022. The disputed domain name is used for a website that contains comments and statements to which the Respondent refers as "the truth about expropriation of private assets in Agrokor", as well as other comments, publications, and videos of highly critical nature on the Croatian internal politics and other international political and economic matters.

#### **5. Parties' Contentions**

##### **A. Complainant**

The Complainant contends that the disputed domain name is reproducing its AGROKOR trademark and is therefore identical to it.

The Complainant contends that the Respondent has no rights or legitimate interests in respect of the disputed domain name and is unable to rely on any of the circumstances set out in Paragraph B(11)(e) of the ADR Rules.

The Complainant claims that the Respondent's use of the disputed domain name that is identical to its trademark to publish factually incorrect and defamatory comments and statements is detrimental to the reputation of its trademark and its business and amounts to bad faith.

The Complainant requests that the disputed domain name <agrokor.eu> be transferred to the Complainant.

##### **B. Respondent**

The Respondent did not reply to the Complainant's contentions.

#### **6. Discussion and Findings**

According to Paragraph B11(d)(1) of the ADR Rules "the Panel shall issue a decision granting the remedies requested under the Procedural Rules in the event that the Complainant proves in an ADR Proceeding

where the Respondent is the holder of a .eu domain name registration in respect of which the Complaint was initiated, that:

- (i) The domain name is identical or confusingly similar to a name in respect of which a right is recognized or established by the national law of a Member State and/or European Union law and; either
- (ii) The domain name has been registered by the Respondent without rights or legitimate interest in the name; or
- (iii) The domain name has been registered or is being used in bad faith”.

**A. Identical or Confusingly Similar to a name in respect of which a right or rights are recognized or established by national law of a Member State and/or European Union law**

The Complainant holds registered rights in the trademark AGROKOR, and for the purpose of this proceeding, the Panel establishes that the EUTM Registration No. 011954872 satisfies the requirement of having a right recognized by the European Union law.

The disputed domain name is replicating the Complainant’s AGROKOR trademark. As the applicable country code Top-Level Domain (“ccTLD”) suffix in the disputed domain name “.eu” should in relation to this administrative proceeding be disregarded the Panel finds that the disputed domain name <agrokor.eu> is identical to the Complainant’s AGROKOR trademark pursuant to Paragraph B(11)(d)(1)(i) of the ADR Rules.

**B. Rights or Legitimate Interests**

Under Paragraph B11(e) of the ADR Rules, a respondent may demonstrate its rights or legitimate interests to the domain name for purposes of Paragraph B11(d)(1)(ii) by showing any of the following circumstances, in particular but without limitation:

- (1) prior to any notice of the dispute, the Respondent has used the domain name or a name corresponding to the domain name in connection with the offering of goods or services or has made demonstrable preparation to do so;
- (2) the Respondent, being an undertaking, organization or natural person, has been commonly known by the domain name, even in the absence of a right recognized or established by national and/or European Union law;
- (3) the Respondent is making a legitimate and noncommercial or fair use of the domain name, without intent to mislead consumers or harm the reputation of a name in which a right is recognized or established by national law and/or European Union law.

According to section 2.1 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition (“[WIPO Overview 3.0](#)”), while the overall burden of proof in UDRP proceedings is on the complainant, panels have recognized that proving a respondent lacks rights or legitimate interests in a domain name may result in the often impossible task of “proving a negative”, requiring information that is often within the knowledge or control of the respondent.<sup>1</sup>

As such, where a complainant makes out a *prima facie* case that the respondent lacks rights or legitimate interests, the burden of production on this element shifts to the respondent to come forward with the relevant evidence demonstrating rights or legitimate interests in the domain name. If the respondent fails to come forward with such relevant evidence, the complainant is deemed to have satisfied the requirement to prove that the Respondent lacks rights or legitimate interests in the disputed domain name.

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<sup>1</sup> Considering the substantive similarities between the ADR Rules and the Uniform Domain Name Dispute Resolution Policy (“UDRP”), the Panel also refers to UDRP precedent, where appropriate.

The Respondent failed to respond to the Complainant's contentions, and by doing so failed to offer to the Panel any type of evidence set forth in Paragraph B11(e) of the ADR Rules, or otherwise counter the Complainant's *prima facie* case.

According to Paragraph 10(a) of the ADR Rules "if a Party fails to comply with any of the time periods established by these ADR Rules or by the Panel, the Panel shall proceed to a decision on the Complaint and may consider this failure to comply as grounds to accept the claims of the other Party".

The Complainant has clearly not authorized the Respondent to use its prior AGROKOR trademark, in a domain name or otherwise.

There is no evidence that the Respondent is making any legitimate noncommercial or fair use of the disputed domain name, nor any use in connection with a *bona fide* offering of goods and services.

The Respondent is in fact using the disputed domain name to direct Internet users to a website that among others contains comments and publications to which the Respondent refers as the "truth about expropriation of private assets in Agrokor", as well as comments, publications, and videos of highly critical nature on Croatian internal politics and international political and economic issues.

The Respondent's website to which the disputed domain name resolves on its face appears to be a criticism site; however the Complainant strongly denies that any of the Respondent's comments or statements concerning the demised company Agrokor d.d – of which he was the majority owner – are factually correct or true.

This Panel is incapable of determining whether the contents on the website, in particular those concerning the demised company Agrokor d.d. are true and/or defamatory, since elements necessary to establish defamation are far beyond the scope of this proceeding.

However, the actual issue in this proceeding is not the truth or falsity of the Respondent's comments, or the motive of such comments and statements, but whether the Respondent is entitled to use the Complainant's trademark as his web address.

The Panel in this regard adheres to a view expressed in a number of previous UDRP decisions that the right to criticize does not extend to registering a domain name that is identical to the owner's registered trademark or conveys an association with the mark (see section 2.6.2 of the [WIPO Overview 3.0](#) and *InMed Diagnostic Services, LLC, InMed Diagnostic Services of S.C., LLC, InMed Diagnostic Services of MA, LLC and InMed Diagnostic Services of IL, LLC v. James Harrison*, WIPO Case No. [D2006-1230](#)).

In addition, clicking on the "O nama" (About Us in English) link on the website at the disputed domain name takes the site visitor to a website at "www.ivicatodoric.hr", which appears to be the principal website of the Respondent containing all comments, publications, and videos that can be found on the website at the disputed domain name. The Panel finds that the Respondent is using the inherently deceptive disputed domain name that replicates the Complainant's trademark only to attract Internet users looking for the Complainant, which is not legitimate and noncommercial or fair use of the disputed domain name.

For the reasons mentioned above, the Panel concludes that the Complainant has established that the Respondent lacks rights or legitimate interests in the disputed domain name pursuant to Paragraph B11(d)(1)(ii) of the ADR Rules.

### **C. Registered or Used in Bad Faith**

According to Paragraph B(11)(d)(1) of the ADR Rules lack of rights or legitimate interests and registration or use in bad faith are alternative requirements.

Although the Panel found that the Respondent lacks any rights or legitimate interests in the disputed domain name and hence there would be no need to separately address the bad faith registration or use requirement, the Panel nevertheless concludes that the Respondent's use of the inherently misleading disputed domain name to illegitimately attract Internet users looking for the Complainant as described above is evidence of bad faith registration and use within the meaning of Paragraph B(11)(f)(4) of the ADR Rules.

## 7. Decision

For the foregoing reasons, in accordance with Paragraph B(11) of the ADR Rules, the Panel orders that the disputed domain name, <agrokor.eu> be transferred to the Complainant<sup>2</sup>.

*/Zoltán Takács/*

**Zoltán Takács**

Sole Panelist

Date: May 11, 2023

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- (i) The decision shall be implemented by the Registry within thirty (30) days after the notification of the decision to the Parties, unless the Respondent initiates court proceedings in a Mutual Jurisdiction, as defined in Paragraph A(1) of the ADR Rules.
  - (ii) The remedy sought is transfer of the disputed domain name to the Complainant. As the Complainant is established and located within the European Union it satisfies the general eligibility criteria for registration of the disputed domain name set out in Article 3 of Regulation (EU) 2019/517.